BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF EP ENERGY E&P COMPANY, L.P. FOR AN ORDER POOLING ALL INTEREST, INCLUDING THE COMPULSORY POOLING OF THE INTERESTS OF ARGO ENERGY PARTNERS, LTD., DUSTY SANDERSON, HUNT OIL COMPANY, KKREP, LLC, AND J.P. FURLONG CO., IN THE DRILLING UNIT ESTABLISHED FOR THE PRODUCTION OF OIL, GAS AND ASSOCIATED HYDROCARBONS FROM THE LOWER GREEN RIVER-WASATCH FORMATIONS COMPRISED OF ALL OF SECTION 2, TOWNSHIP 3 SOUTH, RANGE 5 WEST, U.S.M., DUCHESNE COUNTY, UTAH	**REPLY TO MOTION FOR RECONSIDERATION OF MINUTE ENTRY** Docket No. 2015-013 Cause No. 139-130

COMES NOW, J.P. Furlong Co., ("Respondent") acting by and through its attorney, Anthony T. Hunter, pursuant to Utah Admin. Code Rule R641-100-400, and states:

INTRODUCTION

Respondent can cite no obvious statutory or regulatory authority for its reply, much as EP Energy E&P Company, L.P. ("Petitioner") cannot cite any for its Motion for Reconsideration for Minute Entry ("Petitioner's Submission"). Because the Board did not immediately deny Petitioner's unauthorized motion, Respondent is forced to conclude that the Board would at least considering granting it. Considering Petitioner's unauthorized filing without allowing Respondent to reply would be an exercise of agency discretion that would be extremely prejudicial and cause material harm to Respondent's rights before this tribunal. Therefore, as authorized by the cited Rule, Respondent respectfully requests that the Board consider this reply to Petitioner's Submission "in the furtherance of justice."

Petitioner's Submission has turned a relatively simple post-hearing exercise into a procedural quandary for all parties. As further detailed below, Petitioner's Submission has caused blown regulatory deadlines, has failed to state sufficient grounds for its consideration and has muddied the record and resolution of this Cause.

I. Petitioner's Submission is not permitted by Utah Statute, fails to comply with Board Rules, and its filing has caused unnecessary delay.

First, the Board lacks the authority to grant Petitioner's request under Utah Admin. Code Rule R641-100-400, which specifically forbids "deviation from a rule when such rule is mandated by law." The controlling law in this arena is the Administrative Procedures Act. Specifically, Utah Code Ann. 63G-4-301 (1) (a) states:

> "If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review *of an order* by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days *after the issuance of the order* with the person or entity designated for that purpose by the statute or rule." (*emphasis added*)

The Legislature granted the Board the discretionary authority to draft rules governing post-hearing requests for review of its *orders* at the agency level. The Board has done so. However, the enabling statute requires that an order be issued prior to a party filing a request for review. Until Petitioner submits its proposed text, the Division and the Respondent review it, and the Chairman signs it, *the Board has not issued an order*. There isn't even an order to write the order. The Board doesn't "direct" the Petitioner to prepare a final order, as it is authorized to do under R641-109-100. Instead, it "asks" (Minute Entry, Pages 2 and 5). Therefore, because the statute mandates that the filing of a request for review at the agency level be done *after* an order is issued, the Board may not deviate from its published rules to allow Petitioner's Submission.

Second, even if the Board had the authority to deviate from the requirements of the statute, Petitioner has failed to demonstrate why simply following the procedural rules for post-hearing housekeeping is "impractical or unnecessary" or why deviating from the standard rehearing and judicial appeal process is "in the furtherance of justice or the statutory purposes of the Board."[1] Instead, Petitioner pleads "judicial economy." Respondent respectfully submits that the purpose of publishing agency rules subject to notice and comment is to strike a balance between administrative or "judicial economy" and "due process of law." Absent any showing by Petitioner that any of the four named factors in the rule apply in this case, the Board should enforce its procedural rules as written.

Third, by purportedly striving for "judicial economy," Petitioner has actually delayed and derailed the orderly conclusion of the Cause. By failing to submit a final order within five days of the filing of the Minute Entry, Petitioner has failed to comply with Utah Admin. Code R641-109-100.[2] Additionally, Petitioner's irregular and unauthorized submission has made it impossible for the Board to fulfill its self-imposed regulatory duty under R641-109-200 to sign an order thirty days after the conclusion of the hearing on the matter.[3] For the above reasons, the Board must deny the Petitioner's Submission without considering its merits as untimely and unauthorized by Rule or Statute and strike it from the record of this Cause.

---

[1] "When good cause appears, the Board may permit a deviation from these rules insofar as it may find compliance therewith to be impractical or unnecessary or in the furtherance of justice or the statutory purposes of the Board. Notwithstanding this, in no event may the Board permit a deviation from a rule when such rule is mandated by law." *See* Utah Admin. Code R641-100-400.

[2] "… The Board may direct the prevailing party to prepare proposed findings of fact, conclusions of law, and an order, *which will be completed within five days* of the direction, unless otherwise instructed by the Board..." *See* Utah Admin. Code Rule R641-109-100.

[3] "The Chairman or designated Acting Chairman of the Board will sign the order on any matter no later than 30 days following the end of the hearing on that matter…" *See* Utah Admin. Code Rule R641-109-200.

II. Assuming *arguendo* that the Board considers Petitioner's Submission, Petitioner has failed to meet its burden.

Should the Board reaches the merits of Petitioner's Submission, the Board should deny it based on the grounds that Petitioner has failed to comply with every single requirement of Utah Admin. Code Rule R641-110-200. Petitioner has not specified "the particulars in which it is claimed the Board's order or decision is unlawful, unreasonable, or unfair." To the extent that the Petitioner specifies anything, it "respectfully submits that the Board misplaced [its] emphasis" (Petitioner's Submission, Page 3) on only one of four specific and independent factors that the Board expressly considered in determining that Respondent was a consenting owner. Arguing for a reconsideration of one factor among four fails to raise enough "particulars" required by the rule, as it leaves the other three grounds for the Board's decision untouched.[4]

Additionally, Petitioner fails to comply with the second requirement of the rule: "If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence." Instead, Petitioner introduces a new legal argument it failed to raise during the hearing and then points out specific facts in the record, *from its own exhibit*, that negate the new legal argument. The paragraph in Petitioner's Exhibit N, located right below Respondent's President's signature, cited by Petitioner, bears repeating:

> This authorization for expenditure (AFE) *constitutes a contract* between the non-operator signing the AFE and the operator whereby the non-operator hereby *promises and agrees to pay operator, within thirty (30) days after billing*, its proportionate share of all reasonable expenditures on the described operations *until such time as an operating agreement is executed.* (*emphasis added*)

[4] Including past oilfield experience of the non-operator, non-operator's proposed amendments, and support of the forced pooling request. *See* Minute Entry, Page 3-4.

In this one paragraph, Petitioner cites evidence in the record that conclusively proves that 1) the AFE alone – not the AFE combined with a cover letter – was a contract, 2) for which sufficient consideration *had* been exchanged under Utah law;[5] and 3) that Petitioner expected this contract to mutually bind the parties in the expected and inevitable *absence* of an executed JOA. The evidence shows that, if any "meeting of the minds" had occurred, it took place around the notion that a JOA would *not* be signed concurrently, and the AFE would be sufficient to govern the parties' relationship until it was executed. By drafting around the weaknesses in typical AFE forms exposed by the *Sonat* case,[6] Petitioner evidenced its intent for Respondent to be bound by the terms of the AFE – independent of any JOA. By signing the AFE, Respondent evidenced its intent to be bound by it, too – and evidenced its consent to pay for the drilling and operation of the well.[7]

Further, Petitioner attempts to introduce new evidence into the record of the Cause in the form of its Footnote 1.[8] However, it does so without the submitting an "affidavit setting forth the nature and extent of such evidence, its relevancy to the issues

---

[5] "The law does not enforce all promises. For a promise to be legally enforceable, it must be supported by consideration. Consideration is an act or promise, bargained for and given in exchange for a promise. Promises made by a party pursuant to a bilateral contract to do an act or to forbear from doing an act that would be detrimental to the promisor or beneficial to the promisee may constitute the consideration for the other's promise. For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties." *Resource Management Co. v. Weston Ranch and Livestock Co., Inc.*, 706 P.2d 1028, 1036 (Utah 1985) (*multiple internal citations omitted*). Petitioner promised to bill Respondent for drilling the Neihart Well and Respondent promised to pay the bill within thirty days.

[6] In both the *Sonat* case, and in the 10th Circuit Court of Appeals case it cites, both trial courts relied on testimony of *industry custom and practice* to determine the meaning of AFE's that were missing many important terms and contained no written promises. In this case, we have the black letter words on Petitioner's Exhibit N. *Sonat Exploration Co. v. Mann*, 785 F.2d 1232, 1235 (5th Cir. 1986). *See also Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1359 (10th Cir. 1979).

[7] "This AFE requests funds to drill, complete and *put on production* the Neihart [Well]." (*emphasis added*) Respondent agreed to pay "its proportionate share of all reasonable expenditures on the described operations..." including bringing the Neihart Well on production. Once the well was on production, it would be pretty reasonable for the Petitioner to bill out, and for the Respondent to pay for, its continued production. *See* Petitioner's Exhibit N.

[8] *See* Petitioner's Submission, Page 4.

involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing." Of the all Rule violations occasioned by the Petitioner's submission, this is perhaps the most egregious. The facts of the Cause were established at the hearing. The record was closed. The Board has considered the facts and law, has written a minute entry describing its reasoning, and has asked the prevailing party to write a final order based upon it. Despite the Petitioner's use of the word "clarification" (Petitioner's Submission, Page 2) and "clarified" (*Id.*, Page 7), the practical effect of granting its motion would not be a deeper understanding of the Board's reasoning, but the introduction of unsworn testimony by the Petitioner's counsel. Respondent has no opportunity under rule or statute to rebut this testimony. It can either stand idly by as this assertion becomes part of the record of the Cause, or ask the Board for special permission to submit its own post-hearing evidence – which, of course, Petitioner will likely want to challenge or rebut. This is a fundamental violation of all parties' right to a fair and orderly hearing, fails to comply with the Utah Administrative Procedures Act,[9] and makes a comedy of formal administrative procedures. This attempt to augment the factual record – standing by itself – requires the denial of Petitioner's Submission and striking it from the record of this Cause.

Finally, Petitioner continues to argue that Respondent should suffer "negative consequences"[10] for its conduct in the negotiations despite the specific finding by the Board that Respondent's conduct qualified as consent.[11] Respondent respectfully suggests that Petitioner's continued insistence that the nonconsent penalty is a punitive

---

[9] "All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath." *See* Utah Code Ann. 63G-4-206 (f).
[10] *See* Petitioner's Submission, Page 4.
[11] "The Board, under the circumstances of this case, finds that Furlong did sufficiently consent." *See* Minute Entry, Page 3.

tool to be used on the Respondent – even after the Board explicitly "resolved the parties' disagreements concerning the consenting status"[12] – is evidence that Petitioner's zealous advocacy of its position has at least the potential to cross the line into unfair bias in the drafting of a proper final order. Rather than expend time and effort on a back-and-forth-tug-of-war drafting exercise, it may be better to have a neutral party draft the final order and allow the standard regulatory review and statutory appeal process proceed from there. Respondent, therefore, reluctantly and respectfully requests that the Board exercise its discretionary authority under Utah Admin. Code Rule R641-109-100 and withdraw its request to the Petitioner to draft the final order in this Cause.

WHEREFORE, Respondent respectfully requests that the Board:

1. DENY, without consideration of the merits, Petitioner's Submission; and
    a. STRIKE the Petitioner's Submission from the record as untimely and unauthorized by regulation or statute; and
    b. STRIKE this filing for the same reasons; or in the alternative
2. DENY Petitioner's Submission on the merits, as failing to meet Board standards for the contents of a qualified petition for rehearing under Utah Admin. Code Rule R641-110-200; and
    a. ALLOW Respondent to file an Affidavit and exhibits rebutting the assertion by Petitioner's counsel in Footnote 1 of Petitioner's Submission within ten days of the Board's ruling; and
3. WITHDRAW its request to Petitioner to draft the final order in this Cause.

[12] *See* Minute Entry, Page 5.

Respectfully Submitted this 26th day of May, 2015.

By: _____

Anthony T. Hunter #11675
4715 W. Central
Wichita, KS 67212
(316) 444-0741
(316) 448-0725 Fax
hunterath@gmail.com
Attorney for J.P. Furlong Co.